

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>GERALD CUNNINGHAM,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>NO.</b>
	)	
<b>FEDERAL AVIATION</b>	)	
<b>ADMINISTRATION,</b>	)	
	)	
<b>Defendant.</b>	)	

**COMPLAINT FOR INJUNCTIVE RELIEF**

COMES NOW Gerald Cunningham (Pro Se - Attorney)(hereinafter “Plaintiff”), who files this Complaint alleging a willful violation of 5 U.S.C. § 552, Freedom of Information Act (“FOIA” ), as a result of the Defendant Federal Aviation Administration (“FAA”) improperly withholding agency records. and shows the Court the following:

**I. PARTIES**

1. Gerald Cunningham, Plaintiff - Pro Se, is a resident of the State of Florida. The Plaintiff has been admitted to practice in the Northern District of Georgia since January 1979. The Plaintiff is the FOIA requester and the proper party to bring this action.

2. Defendant FAA is a component of the Department of Transportation (“DOT”) which is a department of the Executive Branch of the United States Government and an agency within the meaning of 5 U. S. C. § 552 (f) (I). The FAA was responsible for the processing of the FOIA request pursuant to its own regulations and the FOIA.

## **II. JURISDICTION AND VENUE**

3. The parties in this action are subject to the personal jurisdiction of this Court and subject matter jurisdiction lies within this Court pursuant 28 U.S.C. § 1331, and 5 U. S. C. § 552(a)(4)(B), to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the plaintiff, who was the requester of the records under the FOIA request.

4. Venue in this court is proper pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §1391(e).

5. A substantial part of the agency records being withheld by the FAA in violation of the FOIA are located in the offices of the FAA Southern Region, situated in the Northern District of Georgia.

6. In addition, on information and belief, a substantial part of the agency records being withheld by the FAA in violation of the FOIA, are located in the offices of the United States Attorney for the Northern District of Georgia.

### **III. ADMINISTRATIVE PREREQUISITES**

7. The Plaintiff submitted the FOIA request to the FAA on October 27, 2011. (Attached hereto as Exhibit 1).

8. Pursuant to 5 U.S.C. § 552(a)(6)(A)(I) the FAA has to meet the following FOIA obligations to trigger an administrative appeal process: (1) provide a decision of the request which set forth its position on the requests; (2) provide the reasons for not providing a decision stating its reasons for not properly responding to the request; and (3) provide notice to the Plaintiff of the right of appeal to the head of the agency in the event of an adverse decision.

9. As of this date, the FAA failed to trigger the administrative appeal process, therefore, the filing of this action at this time is proper.

10. On January 5, 2012, Plaintiff requested procedural information regarding the filing of an administrative appeal. The FAA did not respond.

11. On January 24, 2012, Plaintiff submitted an administrative appeal to the FOIA Coordinator. The notice requested that the appeal be forwarded to the correct office for processing since the FAA had not provided the information.

12. To date, despite numerous requests to the FAA FOIA office, the Plaintiff has not received a response from any FAA FOIA officials more than ten (10) months.

13. The Plaintiff met his Administrative Prerequisites.

#### **IV. FOIA REQUEST**

14. The FOIA request submitted by the Plaintiff on October 27, 2011, requested the following documents:

##### **Documents Requested**

1. All documents relied upon by the FAA to justify the back pay payments to supervisors and managers who worked at the Atlanta Tower and TRACON during the period October 2002 through October 2004, and who were presently employed by the FAA.
2. All documents relied upon by the FAA in its decision not to make back pay payments to supervisors and managers who worked at the Atlanta Tower and TRACON during the period October 2002 through October 2004, and who were retired from the FAA.

3. All documents, including but not limited to the request, justification and approval, related to the authorization of a Cash Award to pay the back pay to the supervisors and managers in 2011 as indicated in the chart attached hereto as Exhibit A.
4. The Standard Form 52 - Request for Personnel Action for each individual paid pursuant to the award-pay listed on Exhibit A.
5. The Standard Form 50 - Personnel Action for each individual paid pursuant to the award - back pay listed on Exhibit A.
6. The Standard Form 52 - Request for Personnel Action for each supervisor or manager paid back pay for the 2002-2004 period who was not covered by the award listed in Exhibit A.
7. The Standard Form 50 - Personnel Action for each supervisor or manager paid back pay for the 2002-2004 period who was not covered by the award listed in Exhibit A.

Attached hereto as Exhibit 1.

## **V. BACKGROUND**

15. On October 27, 2011, Joann Noonan, FAA FOIA Specialist, acknowledged the FOIA request. The request was assigned number FOIA 2012-0064. The envelope containing the FOIA request is postmarked November 18, 2011.

16. The FAA Acknowledgment Letter advised that the following FAA Offices had been assigned to process the FOIA Requests:

- (1) Air Traffic Organization  
800 Independence Avenue SW  
Washington, DC 20591  
Contact: Dean Torgerson  
FOIA Coordinator  
Telephone: 202-493-4119
- (2) Assistant Administrator for Human  
Resource Management, AHR-1  
800 Independence Avenue SW  
Washington, DC 20591  
Contact: Shanna L. Harvey  
FOIA Coordinator  
Telephone: 202-493-5889  
Contact: Shanna L. Harvey  
FOIA Coordinator  
Telephone: 202-493-5889

17. The FAA Acknowledgment letter did not specify the FOIA Request numbers assigned to the two offices identified in its letter.

18. In late November - early December 2011, Plaintiff received a telephone call from Ms. Sherri Jensen, FAA Oklahoma, advising she was processing that portion of the FOIA request related to Requests 5 and 7 (SF-50 Forms). Ms. Jensen requested to permission to submit the data contained on the SF-50 forms in spreadsheet format, instead of producing the actual Form 50s. The Plaintiff agreed.

19. On December 16, 2011, Plaintiff sent an Email Memo to FOIA Specialist Noonan, with copies to FOIA Contacts in Air Traffic and Human Resources offices advising that the Agency responses were due on November 25, 2011. The letter also advised that two (2) previous attempts to contact the Air Traffic and Human Resources contacts were unsuccessful and voicemail messages had not been returned.

20. On December 16, 2011, Plaintiff received a reply Email from FOIA Specialist Noonan, informing him that the Human Resources response had been sent on December 12, 2012. The Email provided the information regarding current status:

Regarding your inquiry of December 16, the Office of Human Resource Management responded to your request on December 12, 2011. The Air Traffic Organization's portion of your request is in "search and review" status; due date was December 13, 2011.

21. On December 16, 2011, Plaintiff also received an Email reply from Dean Torgerson, FOIA Coordinator, Air Traffic Organization, informing that he would be out of the office until December 19, 2011. This was the first and last communication received from Mr. Torgerson.

22. On or about December 19, 2011, Plaintiff received a letter dated December 12, 2011, from Kimberly Moseley, FAA Human Resources, Washington, DC, which stated it was forwarding the information responsive to the FOIA request.

23. The response also stated, in pertinent part:

“Enclosed is the information that is responsive to your request. You were contacted by Ms. Sherri Jensen regarding the media in which you would like this information. In that conversation, you agreed to receiving the enclosed spreadsheet instead of Standard Forms 50 for each individual.”

24. On December 21, 2011, Plaintiff sent a Fax Memo, to Shanna Harvey, HR FOIA Coordinator, sen a response to the letter from Kimberly Moseley, HR. The Plaintiff requested clarification that Human Resources was processing Requests 4, and 6, in addition Requests 5 and 7. Plaintiff also requested an estimate of when expect responses to Requests 4 and 6, since the agency letter did not address these Requests.

25. Plaintiff’s December 21<sup>st</sup> Fax Memo also challenged Ms. Moseley’s responses to Requests 5 and 7, and stated, in pertinent part:

“With respect to items 5 and 7, the AHR-1 response is not what I agreed to with Ms. Sherri Jensen, FAA-OKC. I agreed to accept the data contained on the SF-50 forms in lieu of the actual forms. The spreadsheet I received does not reflect the data on an SF-50 form. It provides only a name, dates of a payment, and payment amount.”



26. The spreadsheet information produced by the FAA was limited to three items: (1) the name of the employee receiving the payment; (2) the amount of the payment; and (3) the date of the payment.

27. At a minimum, the following information contained on the SF-50 Form is being improperly withheld by the FAA:

- 4. Effective date.
- 5. A, B, D Action Information
- 7. Individuals Position Title Information
- 14. Name and location of position's organization
- 23. Employee data.
- 31. Service computation date.
- 34-39. Position data.
- 45. Remarks
- 46-50 Agency information.

28. On December 28, 2011, Plaintiff sent a Fax Memorandum to Noonan, FOIA Specialist, Subj: Failure to Provide Timely Responses:

“This supplements my Memorandum of December 21, 2011, which is incorporated herein by reference. As of this date, it has been forty-three (43) work days since the Agency received and acknowledged the FOIA request submitted on October 27, 2011. I realize that we are going through a holiday season, however, I do not feel that this is a valid reason to abandon the time requirements of the FOIA and FAA Order 1270.1, Ch. 3, Para. 32 (“Order”), especially since the responses were due before the holiday season started. (Attached hereto for reference). If there are supplements to the Order that pertain to any of the issues in this Memo, please provide them to the requester.

I request to be notified on or before January 4, 2012, as to what procedures the FAA is following in the processing of the Request.”

29. In addition, the December 28, 2011, Memo, set forth a detailed analysis of the FAA Time Response and Extension Procedures set forth in the FAA FOIA Order. The FAA did not respond to the Memo.

30. On January 5, 2012, Plaintiff requested assistance from FOIA Specialist Noonan re the proper procedures for filing an Administrative Appeal.

31. FOIA Specialist Noonan did not respond to the January 5, 2012, request.

32. On January 24, 2012, the Plaintiff sent an Email Memorandum to Noonan, FOIA Specialist, subject: **FOIA REQUEST - 2012-0640 - Administrative Appeal**, which stated, in pertinent part:

“In my Memorandum to your office dated January 5, 2012, I requested the name and address of the proper office to submit an Administrative Appeal. I have not received a response. I now have the option of filing in federal court or pursuing an administrative appeal. I would prefer to proceed with an administrative appeal. I am appealing the FAA’s failure to provide a determination concerning the above-referenced request and the failure to respond to requests from the Requester to resolve the problem.

Please consider this my administrative appeal of the Agency's failure to issue a determination related to the above referenced FOIA Request. If your office is not the correct office to process the appeal, please forward this appeal to the proper office immediately."

33. The FAA did not respond to the January 24, 2012, Memo.

34. On February 2, 2012, Plaintiff sent another Email follow-up to Noonan,

which states, in pertinent part:

"I am filing a civil action in the US District Court tomorrow on behalf of the former FAA managers. The information related to the above FOIA Request was to save everyone time by having certain basic information to be used from the outset. Since the FOIA request still has not been properly processed, and it appears that the Administrative Appeal is not being processed, I want to cover this in the Complaint. I am not including a count regarding the FOIA Request. I would like someone to confirm the status of the FOIA Request and the Administrative Appeal. I do not want to provide any incorrect information to the Court."

35. The FOIA Specialist did not responded to the February 2, 2012, Memo.

36. In early May 2012, Plaintiff requested assistance from the Assistant US Attorney in Atlanta, counsel for the Secretary, Department of Transportation, for the action referred to in Paragraph 33, to determine the status of the FAA FOIA Request.

37. On May 7, 2011, the US Attorney responded promptly and stated, in pertinent part:

“Thanks for your patience in allowing me to respond to your question about your FOIA request to the FAA related to the Caraway case. I have spoken with my client, and I anticipate that someone from the FAA’s FOIA department will reach out to you in the near future about your FOIA request. I have been advised that future communications related to your FOIA request will need to be directed to the FAA’s FOIA office.”

38. Plaintiff has not been contacted by “someone from the FAA’s FOIA department.”

39. On September 28, 2012, Plaintiff made one last attempt to receive information from the FOIA Office. An Email Memorandum was sent to Noonan, which stated, in pertinent part:

“I can only assume the Agency did not conduct an Administrative Appeal as I requested, nor does it intend to respond to any of my correspondence. Unfortunately, as I understand it, this leaves me with only one choice and that is to file a civil action.

I am not used to an agency completely ignoring inquiries involving the FOIA, so if I am missing something I would appreciate it if you would notify me at your earliest convenience.”

40. The FAA has not responded to the September 28, 2012, memo.

## **COUNT ONE**

### **FAILURE TO MAKE RECORDS AVAILABLE**

41. Plaintiff incorporates by reference all allegations contained in Paragraphs 1 through 40 of this Complaint as if fully set forth herein.

42. Pursuant to the FOIA, the FAA has an obligation to make requested records promptly available unless specifically excepted by the FOIA.

43. Plaintiff's FOIA requests to the FAA are not within the scope of any exception set forth in the FOIA.

44. Defendant has not made a determination with respect to any of Plaintiff's FOIA Requests as required by the FOIA and its own regulations.

45. At no time did the Defendant make a proper request to the initial time requirements set forth in the FOIA and its own regulations.

46. The Defendant's failure to make the documents requested by the Plaintiff in his FOIA Request violates the Freedom of Information Act, the FAA regulations, and the regulations of the Department of Transportation.

47. The FAA has acted in bad faith in its refusal to respond to the FOIA Request as required by the FOIA and by its complete failure to respond to the repeated inquiries of the Plaintiff.

WHEREFORE, Plaintiff reserves the right to supplement and amend this Complaint and prays that this Court grant the following relief:

- (a) That this Court Order the Defendant FAA produce without objection or reservation the documents identified in Paragraph 14 of this Complaint within ten (10) days of the Court's Order.
- (b) That this Court award to Plaintiff all costs in pursuing this action.
- (c) That the Court issue any and all other relief to the Plaintiff that it deems just and appropriate.

Respectfully submitted this 15<sup>th</sup> day of October 2012.

s/Gerald Cunningham  
Gerald Cunningham - 202100  
FOIA Requester - Attorney Pro Se  
900 Fort Pickens Road, #1033  
Pensacola Beach, FL 32561  
(850) 850-450-940  
[jclegal@aol.com](mailto:jclegal@aol.com)

## **GERALD CUNNINGHAM**

**Attorney at Law**

900 Fort Pickens Road  
Suite 1033  
Pensacola Beach, FL 32561

Telephone: 850-450-9240  
Facsimile: 404 745-8682  
E-Mail: jclegat@aol.com

October 27, 2011

Via Facsimile: (202) 493-5032

Ms. JoAnn Noonan, FOIA Coordinator  
Federal Aviation Administration  
National Freedom of Information Act Staff, ARC-40  
800 Independence Avenue, SW  
Washington, DC 20591

Dear Ms. Noonan:

This request is being submitted pursuant to the Freedom of Information Act, 5 U.S.C. Section 552 ("FOIA"). This request concerns documents related to payments authorized by the Federal Aviation Administration ("FAA") in 2011, to present and former Air Traffic Control Specialists assigned to the Atlanta Tower and TRACON during the years 2002 to 2004. The documents are believed to be located in the Washington Office of the FAA and the Southern Region Office of the FAA.

### **BACKGROUND**

In 2011, the FAA made the determination that Air Traffic Control Specialists assigned to the Atlanta Tower and TRACON were entitled to additional back pay as a result of the facility reaching a higher grade level ("A80 Upgrade") during the period October 2002 through October 2004. The initial decision provided for payments to former/current employees identified by the National Air Traffic Controllers Association ("NATCA").

For the initial round of payments NATCA identified all current NATCA unit employees as well as those who separated from the FAA. No current supervisors or managers nor those who separated from the FAA as supervisors or managers were identified for payment by NATCA. The FAA subsequently reconciled the list to include employees not identified by NATCA.

The FAA subsequently decided to pay those who were supervisors and managers during the period October 2002 through October 2004, provided they were presently employed by the FAA. Thus all employees who worked during the years October 2002 through October 2004 were paid with the exception of the former supervisors and managers who were retired. This document request relates to these payments.

EXHIBIT 1

Ms. JoAnn Noonan, FOIA Coordinator  
Page Two  
October 27, 2011

**DOCUMENTS REQUESTED**

1. All documents relied upon by the FAA to justify the back pay payments to supervisors and managers who worked at the Atlanta Tower and TRACON during the period October 2002 through October 2004, and who were presently employed by the FAA.
2. All documents relied upon by the FAA in its decision not to make back pay payments to supervisors and managers who worked at the Atlanta Tower and TRACON during the period October 2002 through October 2004, and who were retired from the FAA.
3. All documents, including but not limited to the request, justification and approval, related to the authorization of a Cash Award to pay the back pay to the supervisors and managers in 2011 as indicated in the chart attached hereto as Exhibit A.
4. The Standard Form 52 - Request for Personnel Action for each individual paid pursuant to the award-pay listed on Exhibit A.
5. The Standard Form 50 - Personnel Action for each individual paid pursuant to the award - back pay listed on Exhibit A.
6. The Standard Form 52 - Request for Personnel Action for each supervisor or manager paid back pay for the 2002-2004 period who was not covered by the award listed in in Exhibit A.
7. The Standard Form 50 - Personnel Action for each supervisor or manager paid back pay for the 2002-2004 period who was not covered by the award listed in in Exhibit A.

In order to determine my status to access fees, I am a private attorney requesting documents on behalf of my clients.

I will make payment promptly on receipt of the documents, or in advance if you request.

If possible, produce any documents via PDF attachments to email and serve all responses by email. Thank you for your assistance.

Very truly yours,

  
Gerald Cunningham

Enclosure



# Georgia District FY 2011 Data

	FY11 Initial Full Year Projection	Annual Projection as of PP10	YTD Oblig as of May 2011	Projected Remaining Requirements	% Variance Current Projection Vs Initial Projection	Full Year Allowance	Anticipated Surplus/ (Shortfall)	% Variance
<b>PC&amp;B</b>								
Base Pay	\$40,780,571	\$41,970,053	\$27,794,419	\$14,175,634	3%	\$41,970,053	\$0	56%
Holiday	\$1,044,999	\$1,064,045	\$721,699	\$342,346	2%	\$1,064,045	\$0	68%
Terminal Leave	\$156,384	\$171,229	\$65,097	\$106,132	9%	\$171,229	\$0	38%
Overtime	\$3,383,080	\$3,225,123	\$1,916,485	\$1,308,638	-5%	\$3,225,123	\$0	59%
Cash Awards - Management	\$47,559	\$23,055	\$5,250	\$17,805	-52%	\$23,055	\$0	23%
Cash Awards - Payroll	\$0	\$0	\$21,859	(\$21,859)	NA	\$0	\$0	
Cash Awards - Back Pay	\$0	\$4,149,066	\$2,549,066	\$1,600,000	#DIV/0!	\$0	(\$4,149,066)	
Other Pay	\$5,245,133	\$3,520,799	\$1,676,876	\$1,843,923	-33%	\$3,432,779	(\$88,020)	49%
Other Benefits	\$14,922,486	\$15,813,755	\$11,010,841	\$4,802,915	6%	\$15,418,411	(\$395,344)	71%
<b>Total PC&amp;B:</b>	<b>\$65,560,211</b>	<b>\$69,937,125</b>	<b>\$45,761,392</b>	<b>\$24,175,734</b>	<b>7%</b>	<b>\$65,304,696</b>	<b>(\$4,632,430)</b>	<b>70%</b>
Relo/Recruitment/Retention	\$0	\$20,000	\$0	\$20,000	#DIV/0!	\$0	(\$20,000)	
PCS - Carryovers from FY 10	\$0	\$0	\$0	\$0	NA	\$0	\$0	
PCS - ESA Priorities	\$590,040	\$427,883	\$256,730	\$171,153	-27%	\$228,204	(\$199,679)	113%
PCS - Realignments	\$0	\$0	\$0	\$0	NA	\$0	\$0	
<b>Total PCS:</b>	<b>\$590,040</b>	<b>\$427,883</b>	<b>\$256,730</b>	<b>\$171,153</b>	<b>-24%</b>	<b>\$228,204</b>	<b>(\$219,679)</b>	<b>113%</b>
<b>Total PC&amp;B with PCS:</b>	<b>\$66,150,251</b>	<b>\$70,385,008</b>	<b>\$46,018,121</b>	<b>\$24,366,887</b>	<b>6%</b>	<b>\$65,532,900</b>	<b>(\$4,852,108)</b>	<b>70%</b>
<b>Other Objects</b>								
21xxx Travel	\$145,664	\$79,767	\$55,247	\$24,520	-45%	\$79,767	\$0	59.26%
211C Long Term Travel (TDY)	\$0	\$1,204	\$1,204	\$0	#DIV/0!	\$1,204	\$0	100.00%
22xxx Transportation	\$200	\$0	\$0	\$0	NA	\$0	\$0	
23xxx Communications (RC&U)	\$0	\$900	\$347	\$553	#DIV/0!	\$900	\$0	38.61%
24xxx Printing and Copying	\$0	\$0	\$0	\$0	NA	\$0	\$0	
25xxx Other Services	\$3,450	\$3,620	\$2,148	\$1,472	5%	\$3,620	\$0	59.34%
252xx Contractor Services	\$0	\$0	\$0	\$0	NA	\$0	\$0	
26xxx Supplies	\$34,400	\$23,778	\$12,154	\$11,624	-31%	\$23,778	\$0	51.12%
26480 LIS	\$103,074	\$109,385	\$29,400	\$79,985	6%	\$109,385	\$0	26.88%
31xxx Equipment	\$9,150	\$10,867	\$4,776	\$6,091	19%	\$10,867	\$0	43.95%
42xxx Settlements	\$0	\$490	\$490	\$0	#DIV/0!	\$490	\$0	100.00%
xxxx All Other (Full PCS)	\$0	\$0	\$0	\$0	NA	\$0	\$0	
<b>Total Other Objects:</b>	<b>\$295,938</b>	<b>\$230,011</b>	<b>\$105,767</b>	<b>\$124,244</b>	<b>-22%</b>	<b>\$230,011</b>	<b>\$0</b>	<b>45.88%</b>
<b>TOTALS:</b>	<b>\$66,446,189</b>	<b>\$70,615,019</b>	<b>\$46,123,888</b>	<b>\$24,491,130</b>	<b>6%</b>	<b>\$65,762,911</b>	<b>(\$4,852,108)</b>	<b>70%</b>

Highlights/Comments:	Labor:	Non-Labor:	Mid Shift Overtime:
Recruitment Incentives - \$20K	OSW - \$3.3K (reimbursed)	ERAM - \$2.8K	Requested \$114.6K, none in REGIS
Cash Awards Back Pay - \$4 149 1M	CWG - \$5.6K (reimbursed)	TSS - \$24.00 (r	COVATCH OT - \$18K requested, none in REGIS

EXHIBIT A  
Ex 1 Page 3